other crimes evidence is admissible the general rule is that the trial court must instruct the jury as to the limited purpose for which such evidence is admitted.[7] *Miles v. United States*, D.C.App., 374 A.2d 278, 283 (1977). However, considering the overwhelming weight of the evidence that appellant possessed marijuana, it is clear that the jury verdict was not substantially swayed by the failure to instruct. Thus, the failure to give such an instruction was not plain error.[8] *See Watts v. United States*, *supra*, at 709.

The conviction is

Affirmed.

Melvin E. TUTEN, Appellant,

v.

UNITED STATES, Appellee.

No. 81-204.

District of Columbia Court of Appeals.

Argued Nov. 25, 1981.

Decided Feb. 10, 1982.

Defendant was convicted before the Superior Court, District of Columbia, Joseph M. F. Ryan, Jr., Trial Judge, of carrying a pistol without a license, and sentenced to enhanced prison term of two to six years. He appealed. The Court of Appeals, Kelly, J., held that: (1) under Federal Youth Corrections Act section governing unconditional discharge from probation prior to expiration of maximum probation, only those youth offenders who are unconditionally discharged by court before completing FYCA probationary sentence are entitled to have their convictions set aside, and a set aside certificate issued to them, and (2) where defendant completed full term of his Federal Youth Corrections Act probationary sentence and was not discharged by court prior to expiration of his sentence, he was not entitled to automatic set aside of his conviction, and conviction was proper basis for recidivist sentence received for carrying pistol without a license.

Affirmed.

1. Statutes ⇐=207

A statute should not be construed in such a way as to render certain provisions superfluous or insignificant.

2. Infants ⇐=69(3)

Under Federal Youth Corrections Act, convictions are to be set aside only when youth offender has been given probationary sentence, a court in its discretion decides to discharge him from probation before term of his probationary sentence has expired, and discharge is unconditional. 18 U.S.C.A. § 5021(b).

3. Infants ⇐=69(3)

Time span for unconditional release from conviction under Federal Youth Corrections Act is measured by maximum sentence actually imposed, not by maximum possible sentence for that offense. 18 U.S.C.A. § 5021(b).

4. Infants ⇐=69(3)

Legislative history of Federal Youth Corrections Act indicates intent to use set aside provision of Act to give ex-offenders opportunity to clear their records so they will not be hampered in economic and other opportunities later in life. 18 U.S.C.A. § 5021(b).

5. Infants ⇐=69(3)

While conviction under Federal Youth Corrections Act, may be officially set aside

7. *See* Criminal Jury Instructions for the District of Columbia, No. 2.49 (2d ed. 1972).

8. In light of the fact that appellant did not request that a limiting instruction be given, the standard of appellate review is whether plain error was committed. *See Miles v. United States*, *supra*, at 282. *See* note 3, *supra*.

in court records, set aside certificate has no effect on newspapers or other accounts of conviction. 18 U.S.C.A. § 5021(b).

6. Infants ⇐69(5)

Only those youth offenders who display exemplary behavior during probation or commitment are entitled to have their convictions set aside under Federal Youth Corrections Act. 18 U.S.C.A. § 5021(b).

7. Infants ⇐69(5)

A court will discharge a youth offender under Federal Youth Corrections Act only when it concludes that rehabilitation is complete. 18 U.S.C.A. § 5021(b).

8. Infants ⇐69(5)

Federal Youth Corrections Act conviction must actually be set aside before expiration of probationary sentence imposed upon youth offenders. 18 U.S.C.A. § 5021(b).

9. Infants ⇐69(1)

Principal purpose of Federal Youth Corrections Act is to rehabilitate persons who are unusually vulnerable to danger of recidivism because of their youth. 18 U.S.C.A. §§ 5005 et seq., 5021(b).

10. Infants ⇐69(1)

Rehabilitation is substituted for retribution under Federal Youth Corrections Act as a sentencing goal. 18 U.S.C.A. §§ 5005 et seq., 5021(b).

11. Infants ⇐69(5)

To effectuate sentencing goal of rehabilitation, Federal Youth Corrections Act empowers trial judge with broad discretion to choose among available sentencing options. 18 U.S.C.A. §§ 5005 et seq., 5010(e), 5021(b).

12. Infants ⇐69(5)

Federal Youth Corrections Act allows trial judge to obtain extremely comprehensive presentence report. 18 U.S.C.A. § 5010(e).

13. Infants ⇐69(3)

Public policy strongly favors sentencing youths under Federal Youth Corrections Act whenever possible. 18 U.S.C.A. § 5005 et seq.

14. Criminal Law ⇐1202(1)

Since enhanced penalty under statute depends on type of prior conviction, not on type of sentence received for prior conviction, two persons with same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under Federal Youth Corrections Act and other was not. 18 U.S.C.A. §§ 5010(e), 5021(b).

15. Statutes ⇐188

Unless there are persuasive reasons to contrary, Court of Appeals must construe a statute according to ordinary meaning of its words.

16. Infants ⇐69(5)

Under Federal Youth Corrections Act section governing unconditional discharge from probation prior to expiration of maximum probation, only those youth offenders who are unconditionally discharged by court before completing FYCA probationary sentence are entitled to have their convictions set aside, and have a set aside certificate issued to them. 18 U.S.C.A. § 5021(b).

17. Criminal Law ⇐1202(1)

When conviction has not been set aside, it may be basis of recidivist penalty.

18. Criminal Law ⇐1202(1)

Where defendant completed full term of his Federal Youth Corrections Act probationary sentence and was not discharged by court, prior to expiration of his sentence, he was not entitled to automatic set aside of his conviction, and conviction was proper basis for recidivist sentence received for carrying pistol without a license. D.C.Code 1981, § 22-3204; 18 U.S.C.A. § 5005 et seq.

Linda S. Gillespie, Washington, D. C., appointed by the court, for appellant.

Lisa J. Stark, Asst. U. S. Atty., with whom Charles F. C. Ruff, U. S. Atty., and John A. Terry and Barry M. Tapp, Asst. U. S. Attys., were on the brief, for appellee.

Before NEWMAN, Chief Judge, and KELLY and NEBEKER, Associate Judges.

KELLY, Associate Judge:

Appellant was convicted by a jury of carrying a pistol without a license in violation of D.C.Code 1981, § 22-3204, and, on January 26, 1981, was sentenced to a prison term of two to six years. The issue on appeal is whether a felony recidivist sentence may be imposed on the basis of a prior Federal Youth Corrections Act (FYCA) conviction. 18 U.S.C. § 5005 *et seq.* (1976).

Appellant, on November 16, 1970, had previously been sentenced under the FYCA to two years probation for carrying a pistol without a license. He was discharged unconditionally at the end of the two years. Appellant did not apply for a certificate setting aside his conviction, and no such certificate was issued by the court. Appellant (in this case) was again found guilty of carrying a pistol without a license on November 25, 1980. Pursuant to D.C.Code 1981, § 22-111, the prosecutor informed the trial court of the earlier conviction which made appellant eligible for an enhanced penalty under D.C.Code 1981, § 22-3204. Based on the earlier conviction, appellant was sentenced as a felon rather than as a misdemeanant.

To determine whether a FYCA conviction may be the basis for a felony recidivist sentence, we look first to the language of the statute itself. *Lewis v. United States*, 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980); *Davis v. United States*, D.C.App., 397 A.2d 951, 956 (1979). The FYCA provides in 18 U.S.C. § 5021(b) that

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

[1] Appellant contends that it was error to base his 1981 sentence on his prior FYCA conviction because that conviction should have been automatically set aside under § 5021(b). He argues that the plain language of the statute, its legislative history, and its purposes mandate an automatic set aside because he successfully completed the probationary sentence imposed upon him under the FYCA. However, the assertion that § 5021(b) mandates automatic set aside ignores the phrase "prior to the expiration of the maximum period of probation heretofore fixed by the court." A statute should not be construed in such a way as to render certain provisions superfluous or insignificant. *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 519–520, 99 L.Ed. 615 (1955); *Zeigler Coal Co. v. Kleppe*, 175 U.S.App.D.C. 371, 378, 536 F.2d 398, 405 (1976). Following appellant's interpretation of the statute would necessitate violating this fundamental rule of statutory construction.

[2] The language of the statute indicates that convictions are to be set aside only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is unconditional.

[3] Appellant places primary reliance in his argument on *United States v. Arrington*, 618 F.2d 1119 (5th Cir. 1980), *cert. denied*, 449 U.S. 1026, 101 S.Ct. 876, 66 L.Ed.2d 812 (1981). The *Arrington* court decided that a FYCA conviction is automatically set aside when the defendant is sentenced to any term less than the maximum available sentence and the defendant is unconditionally discharged, regardless of whether the discharge occurred before completion of the actual sentence imposed. Not only, in our judgment, does *Arrington* rely on unpersuasive authority, but also the House of Representatives Report makes clear that the time span for unconditional release is measured by the maximum sentence actually imposed, not by the maximum possible sentence for that offense. The report states that the youth offender must be discharged "unconditionally on or

before the expiration of the maximum term *fixed by the sentencing judge.*"[1] H.R.Rep. No.2979, 81st Cong., 2d Sess. 4 (1950) (H.R. Rep.), *reprinted in* [1950] U.S.Code Cong. Serv. 3983, 3986 (UCCS) (emphasis added).

[4-7] Appellant correctly asserts that the legislative history of the FYCA indicates the intent to use the set aside provision of the FYCA to give ex-offenders the opportunity to clear their records so they will not be hampered in economic and other opportunities later in life. *Doe v. Webster*, 196 U.S.App.D.C. 319, 328, 382 n.51, 606 F.2d 1226, 1234-35, 1239 n.51 (D.C.Cir.1979); *Hearings on S 1114 and S. 2609 Before A Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 70 (1949) (Hearings) (Testimony of Chief Judge Orie L. Phillips of the United States Court of Appeals for the Tenth Circuit), "This law blots out their sentence and lets them go without any stigma on their life...." *Id.* at 12. When a conviction is set aside, a certificate is issued to the youth offender. A particularly valuable benefit for offenders sentenced under the FYCA is the prospect of earning this certificate. *Durst v. United States*, 434 U.S. 542, 548, 98 S.Ct. 840, 842, 55 L.Ed.2d 14 (1978). When the opportunity for earning a set aside certificate was extended to youth offenders placed on probation in 1961, it was noted that this provision "provides an additional incentive for maintaining good behavior by holding out to the youth an opportunity to clear his record." 87 Cong.Rec. 8709 (1941) (Testimony of Mr. Dodd). While a conviction may be officially set aside in the court records, it has no effect on newspapers or other accounts of the conviction. *Doe v. Webster*, *supra* at 328, 606 F.2d at 1233. The certificate serves as handy evidence to prove to potential employers and others that the conviction has been eradicated by the good conduct of the offender. However, it is evidence that this opportunity was not intended for all those sentenced under the FYCA. Only those offenders who display exemplary behavior during probation or commitment are entitled to have their convictions set aside. *See Watts v. Hadden*, 651 F.2d 1254, 1278 (10th Cir. 1981); *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973). A court will discharge a youth offender only when it concludes that rehabilitation is complete. *See* H.R. Rep. at 9, UCCS at 3982; S.Rep.No.1180, 81st Cong., 1st Sess. 2, 11 (1949) (S.Rep.); Hearings at 45 (Testimony of U.S. Circuit Judge John J. Parker).

In discussing the differences between a criminal conviction and one that can be automatically set aside under the FYCA, the court stated in *Tatum v. United States*, 114 U.S.App.D.C. 48, 51, 310 F.2d 854, 857 (1962): "[A] person sentenced under the Youth Corrections Act can, by virtue of his own good conduct, be spared the lifelong burden of a criminal record.... [I]t can, by the choice and conduct of the individual, become a noncriminal episode so far as the public records are concerned."

[8] Most importantly, the conviction must actually be set aside before expiration of the probationary sentence imposed upon the youth offender. Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia stated that "committed youth offenders who earn their

1. *Arrington* cites *United States v. Ferguson*, 565 F.2d 1270 (4th Cir. 1977), *United States v. Fryer*, 548 F.2d 11 (5th Cir. 1976), and *Minshew v. United States*, 410 F.2d 208 (5th Cir. 1969). *Ferguson* is unpersuasive authority because the defendant's FYCA sentence was set aside prior to the expiration of his actual probationary sentence. *Fryer* merely holds that a FYCA conviction which has been set aside cannot constitute a conviction for purposes of 18 U.S.C.App. § 1202(a) [illegal possession of firearm by a convicted felon] or 18 U.S.C. § 922(a)(6) [making false statement when buying a firearm]. *Minshew* provides, "In the event that he is unconditionally discharged before the expiration of his maximum sentence, the conviction will automatically be set aside. 18 U.S.C. § 5021." *Id.* at 207. None of these cases discuss the maximum available sentence in relation to the actual sentence imposed.

United States v. Viller, 416 F.Supp. 857, 859 (S.D.N.Y.1976), is the only case which supports *Arrington's* interpretation of § 5021. It states in dicta, "If he were to be convicted as a Young Adult Offender, however, his conviction would be automatically set aside upon his discharge from probation. 18 U.S.C. § 5021." *Viller* does not explain or elaborate on this statement.

final discharge *before* the end of their maximum term have their records cleared and all their civil rights restored." Hearings at 14 (emphasis added). Section 5021(b) is carefully drafted to allow only those youth offenders who were given probationary sentences and who were unconditionally discharged by a court before the completion of their sentences to reap the benefits of having their convictions set aside.[3] Had Congress intended the convictions of all youth offenders to be set aside upon successful completion of their probationary sentences, it could have stated so clearly.

[9-13] The principal purpose of the FYCA is to rehabilitate persons who are unusually vulnerable to the danger of recidivism because of their youth. *Dorszynski v. United States*, 418 U.S. 424, 432, 94 S.Ct. 3042, 3047, 41 L.Ed.2d 855 (1974); H.R.Rep. at 1, UCCS at 2983; S.Rep. at 1. Thus, rehabilitation is substituted for retribution as a sentencing goal. *Durst v. United States*, *supra*, 434 U.S. at 543, 98 S.Ct. at 851; H.R.Rep. at 1, 8, UCCS at 2982, 2985. To effectuate this goal, the FYCA empowers the trial judge with broad discretion to choose among available sentencing options. *Dorszynski v. United States*, *supra* at 437, 94 S.Ct. at 3049. It allows the trial judge to obtain an extremely comprehensive presentence report. *See Ralston v. Robinson*, — U.S. —, —, 102 S.Ct. 233, 239, 70 L.Ed.2d 345 (1981); 18 U.S.C. § 5010(e); S.Rep. at 2, 10. In this way, sentences can be determined according to the needs of the particular offender, rather than according to the type of crime committed. *Dorszynski v. United States*, *supra* at 434, 94 S.Ct. at 3048. The Act emphasizes flexibility and individual attention. *Durst v. United States*, *supra* 434 U.S. at 545, 98 S.Ct. at 851. *See* Hearings at 63. For this reason, public policy strongly favors sentencing youths under the FYCA whenever possible. To hold that FYCA convictions may not serve as the basis for a recidivist penalty might skew the priorities of a trial court, for when there is a choice between sentencing a defendant as a misdemeanant or under the FYCA, the court may choose the former merely because it could serve as the basis for a later felony conviction, while the FYCA sentence could not. Thus, such a holding could vitiate the policy in favor of sentencing under the FYCA.[4]

[14] Appellant was sentenced under D.C.Code 1981, § 22-3204. It provides for an enhanced penalty when "the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony...." Since the enhanced penalty depends on the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not. *Cf. United States v. Wilson*, 404 F.2d 521 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003, 89 S.Ct. 1600, 22 L.Ed.2d 781 (1969). (Second offender status is determined by prior conviction under Narcotics Drugs Import and

3. *Dorszynski v. United States*, 418 U.S. 424, 435, 94 S.Ct. 3042, 3048, 41 L.Ed.2d 855 (1974); *Watts v. Haddon*, *supra*; *United States v. Henderson*, 482 F.Supp. 234, 236 (D.N.J.1979); *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973); *United States v. Brunson*, 449 F.2d 302 (10th Cir.), *cert. denied*, 405 U.S. 994, 92 S.Ct. 1268, 31 L.Ed.2d 463 (1971); *e.g.*, *Doe v. Webster*, *supra*; *cf. Tatum v. United States*, *supra*; *Cunningham v. United States*, 461 F.2d 993, 996 (9th Cir. 1972); *Nast v. United States*, 415 F.2d 338, 340 (10th Cir. 1969) (FYCA offenders with non-probationary sentences imposed upon them who are unconditionally discharged before completion of their sentences are entitled to have their convictions set aside).

4. Apart from the testimony of Mr. Dodd, the comments cited herein discuss the 1950 version of the FYCA. Although youths placed on probation were generally charged with lesser offenses, the 1950 version of the Act did not include them. In 1961, § 5021(b) was added. The amendment simply extended the opportunity to have a conviction set aside to youth offenders placed on probation. Because Congress evidenced no intention to alter the basic purpose or functioning of the FYCA in 1961, the comments cited herein are pertinent to § 5021(b). *See* 87 Cong.Rec. 8709 (1961) (Testimony of Mr. Dodd).

— For more information on the legislative history of the FYCA, *see Doe v. Webster*, *supra*.

Export Act or other enumerated statute rather than by actual imposition of sentence under one of them.) This provision evidences the congressional belief that no purpose would be served by giving a repeat offender a lenient sentence because he obviously was not rehabilitated by serving the lenient sentence the first time. This applies even more forcefully to the FYCA since persons sentenced under it are given greater opportunities for rehabilitation than are other offenders.

[15, 16] Unless there are persuasive reasons to the contrary, we must construe a statute according to the ordinary meaning of its words. *See Temporaries Inc. v. District Unemployment Compensation Board*, D.C.App., 394 A.2d 14, 17 (1978). In the instant case, the legislative history contains no persuasive reasons to the contrary, while the case law and public policy support the plain meaning of the statute. Accordingly, we hold that under the FYCA § 5021(b) only those youth offenders who are unconditionally discharged by a court before completing a FYCA probationary sentence are entitled to have their convictions set aside, and have a set aside certificate issued to them.

[17, 18] When a conviction has not been set aside, it may be the basis of a recidivist penalty. *Barber v. United States*, 570 F.2d 1219, 1228 (10th Cir. 1978); *See United States v. Brunicky*, 588 F.2d 773 (10th Cir. 1978); *cf. Lewis v. United States*, *supra* 445 U.S. at 61 n.5, 100 S.Ct. at 913 ("... a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated."); *New Bonner Institute, Inc. v. Dickerson*, 649 F.2d 216, 219 (4th Cir. 1981) (a federal firearm disability imposed because of a prior felony conviction is removable by vacation of the prior conviction). In the instant case, appellant completed the full term of his probationary sentence; he was not discharged by a court prior to the expiration of his sentence. Thus, he was not entitled to an automatic set aside of his conviction, and the conviction was a proper basis for the recidivist sentence he received in 1980 for carrying a pistol without a license.

If sentencing a defendant as a felon based on a FYCA conviction is unjust, the remedy must be afforded by Congress, not by this court in the guise of statutory construction, because questions of severity of punishment are peculiarly for the legislature. *Dorszynski v. United States*, *supra* 418 U.S. at 442, 94 S.Ct. at 3082.

Affirmed.

James W. KEGLEY, Appellant,

v.

DISTRICT OF COLUMBIA, et al., Appellees.

No. 80-122.

District of Columbia Court of Appeals.

Submitted Nov. 4, 1981.

Decided Feb. 16, 1982.

Former police officer appealed from review by the Superior Court, District of Columbia, Paul F. McArdle, Trial Judge, of metropolitan police department police trial board decision dismissing him from police force. The Court of Appeals, Kelly, J., held that: (1) scope of review in Superior Court of decision made by trial board is same as Court of Appeals' scope of review of contested case under District of Columbia Administrative Procedure Act; (2) trial court clearly erred in review of dismissal decision where it did not apply standard of review similar to that embodied in Act but heard additional evidence in case and plainly substituted its judgment for that of trial board; (3) when decision of Superior Court reviewing action of trial board is appealed, Court of Appeals uses scope of review employed in reviewing contested cases; and (4)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN,

Defendant.

Criminal Action No. F-6581-79

Washington, D. C.

Monday, January 5, 1981

The above-entitled action came on for a sentencing before the Honorable JOSEPH M. F. RYAN, JR., Associate Judge, in Courtroom Number 44, commencing at approximately 10:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

R. DENNIS OSTERMAN, Esquire
Assistant United States Attorney

On behalf of the Defendant:

THOMAS FARQUHAR, Esquire
Washington, D. C.

Kathleen L. Peterson
Official Court Reporter

Telephone 727-1769

PROCEEDINGS

THE DEPUTY CLERK: United States versus Melvin E. Tuten, for sentencing.

THE COURT: This was a jury trial?

MR. FARQUHAR: That's correct.

THE COURT: He has an arson trial scheduled for the 26th?

MR. FARQUHAR: That's correct, Your Honor.

MR. OSTERMAN: This is Mr. Tapp's case. I don't know whether he wanted to be here for this or not.

THE COURT: I think he probably did.

I tell you, when I read the presentence report today -- I think I'd like to know what happens -- am I going to try the 26 January case ?20?

MR. FARQUHAR: Yes, Your Honor.

THE COURT: I think I'd like to set sentencing after that, after the trial on that case.

MR. FARQUHAR: All right.

Your Honor, I might state, if you wish, we could carry it along till that trial. Plus, I have been trying to inquire into the validity of the prior conviction in this particular case. It's a CDW felony, based on a prior CDW conviction. My understanding was the earlier conviction was under the youth act. The presentence report says it was not expunged, but it is my understanding under 55-021(c)

///

it is automatic if you go four years. I ordered the files from the record center on December 4th, but they haven't come in yet. So possibly they could come in in that time.

THE COURT: Let's put this toward the end of the month, after the other trials.

THE DEPUTY CLERK: 28th, 29th?

MR. FARQUHAR: 28th I think would be fine.

[Thereupon, the proceedings in the above-entitled action were concluded at approximately 10:32 a.m.]

///

CERTIFICATE OF REPORTER

I, Kathleen L. Peterson, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the sentencing in the case of UNITED STATES OF AMERICA v. MELVIN E. TUTEN, Criminal Action No. F-6581-79, in said Court, on the 5th day of January, 1981.

I further certify that the foregoing three pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 2nd day of May, 1981.

Official Court Reporter.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA :

v. : Criminal Action No. F-6581-79

MELVIN E. TUTEN, :

Defendant :

Washington, D. C.

Monday, January 26, 1981

The above-entitled action came on for Sentencing before the Honorable JOSEPH M. F. RYAN, JUNIOR, Associate Judge, in Courtroom No. 44, commencing at approximately 9:30 o'clock a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

B. M. TAPP, Esquire
Assistant United States Attorney

On behalf of the Defendant:

T. W. FARQUHAR, Esquire
Washington, D. C.

...

Robert Bradley
Official Court Reporter Telephone 727-1767

PROCEEDINGS

DEPUTY CLERK: Your Honor, number 5 on Your Honor's sentencing calendar, United States versus Mr. Melvin E. Tuten, Case No. F-6581-79.

THE COURT: Mr. Tuten, you are here for sentencing after conviction by a jury on the offense of carrying a dangerous weapon. I will give you a chance to speak, or have your attorney speak on your behalf before I pronounce sentencing.

MR. FARQUHAR: Just briefly, just one point that I want to make, possibly two.

One point the Report recommendation to the Court is favorable, much more than I anticipated.

Although I suppose it's somewhat realistic in his point of view of the event.

One point I did want to raise with the Court in this case, I have looked into the matter in some detail and I think it, as far as conviction is concerned, the only sentence would be a misdemeanor and not as a convicted felon. As you know this case is basically one where he had a prior conviction of carrying a dangerous weapon.

I think the offense took place 1970, and the conviction was in February 1971.

At that time he was Youth Act eligible for sentencing under the Youth Correction Act, and as I see the

law frankly, I admit it is not a case one way or the other.

Under the Federal Youth Corrections Act he goes for 4 years without any conviction, and that conviction was espunged, and could not be used for the purpose of recidiviance to enhance the penalty on the second conviction of carrying a dangerous weapon. ..

I think I mentioned once before and to Mr. Tapp, I had looked into the matter and I did order the records from the Records Center, and I just don't know where the records are.

My original order for the records was dated December 1st, and we are working now almost to February 1st, and no records have come in yet.

I would be hopeful I could see the records and see precisely what was done.

Even without the records I would still contend more than likely that I am correct in this matter.

I haven't been able to find a case one way or the other.

There is a case from the United States Court of Appeals called Stevenson, and they say espunged can't be used. It is not one that's thoroughly held, it is kind of a surprise, and if the Court thinks it would affect it along that line, you would have to come up with a particular Youth Act sentence available in this case. If it has come

up with one, I can't find one, and I just wanted to point that out to Your Honor. I do think it would make a big difference.

THE COURT: Mr. Tapp.

MR. TAPP: I would like to point out to the contrary. Mr. Tuten is exposed to a 10 year maximum felony for this particular offense. 5010(a) provides that he may be sentenced as a youth offender and unless on a motion of counsel, and if the Court desires if following a motion the recommendation of counsel, it can certainly espunge it.

But no such motion has been made in this case. And the prior docket in this particular case reflects that Mr. Tuten was convicted in 1971, and in that matter has not been espunged since trial.

It is not a question of getting a request or looking at the Court records. And I personally looked at the Court jacket today and got a copy, a certified copy of the conviction which indicates that Mr. Tuten was convicted in 1971 for carrying a pistol without a license. And the matter has not been espunged since that time.

The argument is moot unless old counsel or new counsel, whoever makes a motion to the prior Judge.

Mr. Tuten did that probation, as a matter of fact, and it wasn't even an espungement with respect to the 5010(a) conviction.

I further point out that the facts of this case indicated that Mr. Tuten was carrying a pistol, and was not only carrying it in violation of the law of the District of Columbia, he was carrying it, I dare say, with the intent to use it according to the evidence that we heard from the witnesses. Specifically the mother testified that when Mr. Tuten walked up to the house and asked for her son he was carrying the pistol in his back. Then he was cruising back and forth in front of the house before the Police finally stopped him and apprehended him with the pistol.

Based on the facts of the circumstances in this case a particular period of incarceration is certainly warranted based on the facts of he was carrying a pistol in this particular case. But on other instances with his record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests. His present record indicates violent act outs or behavior of Mr. Tuten, and I think a period of incarceration is warranted under the circumstances.

THE COURT: Do you care to reply?

MR. FARQUHAR: Just one remark.

The only difference and the dispute that I would make with Mr. Tapp is, as I understand as far as the espungement is concerned that is automatic under the Statute I believe 5021(d). I am not sure of the provision.

As far as the certificate of rehabilitation is concerned, the statute is somewhat unclear. And I have no idea from what I can tell of any lascivious history. It is not really clear if you go over the certificate of rehabilitation and you have to move the Court as far as espungement is concerned, and I believe that is automatic. I think his argument would be in error on that point. That is the only point I wanted to make.

THE COURT: It just does seem to me that the purpose would be defeated for putting anybody under a Youth Act sentence, no matter how he behaved under a Youth Act sentence, it is just not automatically going to get espunged. I don't think that would be the intent.

Well, I go along with Mr. Tapp's argument. It is probably an interesting point for the Court of Appeals.

But I have looked at my notes and I disagree with the presentence report.

I tried the case. I think I got about 4 or 5 pages of notes.

My sentencing will be 2 to 6 years.

And, Mr. Tuten, you do have a right to appeal.

If you can't afford an appeal you can file in the form of a pauper and the Court Clerk will file an appeal for you if you so desire.

CERTIFICATE OF REPORTER

I, Robert Bradley, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had, upon the sentencing in the case of UNITED STATES OF AMERICA v. MELVIN E. TUTEN, Criminal Action No. F-6581-79, in said Court, on the 26th day of January, 1981.

I further certify that the foregoing 6 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this 14th day of May, 1981.

Robert Bradley
Official Court Reporter

District of Columbia
Court of Appeals

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED MAR 30 1982
Clerk

No. 81-204

MELVIN E. TUTEN, Appellant,

v. F 6581-79

UNITED STATES, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, and Belson, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that appellant's petition is denied.

PER CURIAM

Copies to:

Honorable Joseph M. F. Ryan, Jr.

Clerk, Superior Court

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